

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 08-1123

JESSICA LEE LAMBERT

APPELLANT

V.

LEWIS DALE LAMBERT

APPELLEE

Opinion Delivered APRIL 22, 2009

APPEAL FROM THE YELL COUNTY
CIRCUIT COURT, [NO. DR-07-115]

HONORABLE DAVID H.
MCCORMICK, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Jessica Lee Lambert and appellee Lewis Dale Lambert were married on June 12, 1999, and separated on December 14, 2007, at which time Mr. Lambert filed for divorce. The parties have a set of triplets who were born on May 23, 2006. The parties reached an agreement as to the division of most of their property, and a hearing was held to determine custody and the division of other property including certain payments into a wholesale GMAC account, and an AFLAC insurance policy. After a hearing, Ms. Lambert was awarded primary physical custody of the children, with any major medical decisions being made jointly, and Mr. Lambert was ordered to pay child support. In addition, the trial court found that two account deposits totaling \$23,976.60 were the non-marital property of Mr. Lambert, and that Mr. Lambert shall keep the AFLAC policy and any benefits paid in accordance with the policy as his personal property.

Ms. Lambert now appeals, raising two arguments for reversal. First, she argues that the entire wholesale GMAC account should have been divided equally between the parties, and that the trial court erred in deducting \$23,976.60 from that account and awarding it to Mr. Lambert as his separate property. Next, Ms. Lambert contends that the trial court erred in failing to divide the AFLAC insurance policy because it was marital property.

Although we review equity cases de novo on the record, we do not reverse unless we determine that the trial court's findings of fact were clearly erroneous. *Boyster v. Shoemake*, 101 Ark. App. 148, 272 S.W.3d 139 (2008). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004). In reviewing the trial court's findings, we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.*

Mr. Lambert testified that he and his father own Lambert Motors Incorporated. There exists a wholesale account whereby Mr. Lambert writes checks to Lambert Motors, who then loans the money to GMAC, and GMAC pays interest on the money and deposits it back to Lambert Motors. Mr. Lambert stated that he is able to withdraw his percentage of his investment in the account when it is available. Mr. Lambert indicated that his portion of the account is currently \$53,000, and he conceded that the account was marital property except for two deposits.

The first of these deposits relates to a one-year CD taken out by Mr. Lambert and his mother in January 1999 prior to the parties' marriage. Mr. Lambert testified that the CD

matured at a value of \$15,804.45 in January 2000, and on January 21, 2000, he deposited the funds into the parties' joint checking account. On the same day, Mr. Lambert wrote a \$16,000 check from the joint checking account to Lambert Motors for deposit into the wholesale GMAC account. That check contained the notation "CD Deposit – Money Market GM." The payment ledger documenting Mr. Lambert's payments into the wholesale account contains the notation, "\$15,804.45 CD," next to the \$16,000 deposit entry. Mr. Lambert explained that the \$15,804.45 was not directly deposited into the wholesale account because deposits and withdrawals into and from that account have to be made in even increments. Because the amount generated from the CD originated prior to the parties' marriage, Mr. Lambert claimed it as non-marital property.

The other deposit at issue concerns an IRA inheritance check for \$8172.15 received by Mr. Lambert on September 26, 2000, after the death of his grandmother. Mr. Lambert testified that he deposited this check into the wholesale account, but before he did that he deposited it into the parties' joint checking account. Mr. Lambert's bank records show that there was a \$8172.15 deposit into the joint checking account on October 4, 2000. He wrote an \$8500 check dated October 3, 2000, and a \$1500 check dated October 4, 2000, to the Lambert account from the joint account. His bank documents reflect that these transactions were recorded on October 5, 2000. Mr. Lambert asserted that he decided to write two checks totaling \$10,000 to "top it off and keep it even numbers on the wholesale account," and he was only claiming the amount that he received from his inheritance as separate property. The ledger sheet for the wholesale GMAC account contains the notation,

“Inheritance IRA – \$8,172.15” beside the \$10,000 deposit. Mr. Lambert testified that both contested deposits of \$15,804.45 and \$8172.15 remain in the wholesale GMAC account.

Mr. Lambert also gave testimony concerning the extensive health problems of the parties’ children, and the health insurance policies held by the parties. All three children were born prematurely, weighing three pounds or less, and remained in the hospital for about ninety days. According to Mr. Lambert, one of the children, Kaleb, is in relatively normal health. However, Jordan suffered from a bacterial infection requiring emergency surgery and resulting in the loss of seventy-five percent of her large intestine. Jordan had an extended stay in the hospital of about ninety days after that procedure, and has since been hospitalized for other medical problems. The remaining child, Braden, has experienced the most serious health problems of the three children. Braden has been diagnosed with cystic fibrosis, which is a terminal disease attacking the respiratory and digestive systems. Braden was very seriously ill and in the hospital for about ninety days during his diagnosis and initial treatment for this illness. Mr. Lambert testified that Braden requires daily lung treatments using a machine, and that during their marriage both he and Ms. Lambert would administer the treatments. Braden also has other significant health problems, and receives most of his nutrition through a feeding tube.

Mr. Lambert testified that Ms. Lambert has a Blue Cross/Blue Shield insurance policy that covers the primary insurance on the children. Mr. Lambert indicated that he pays for a program called TEFRA through his employment, which is supplemental insurance through Arkansas Medicaid that only covers Braden due to his terminal cystic fibrosis. He agreed that

the TEFRA insurance needs to continue, and the trial court ultimately ordered Mr. Lambert to maintain that insurance for Braden. During Ms. Lambert's pregnancy, Mr. Lambert took out a supplemental AFLAC policy that covers all three children, and the monthly premium is deducted from his paycheck. Mr. Lambert stated that AFLAC provides coverage for hospitalization and some surgeries, and that after a hospitalization stay he submits a claim. Since the parties' separation, Mr. Lambert has submitted one such claim, and received a \$100 payment that he deposited into his checking account. Mr. Lambert stated that he would like to continue to retain all of the funds from the AFLAC policy in the future should one of the children require hospitalization.

Ms. Lambert acknowledged in her testimony that Mr. Lambert put non-marital funds into a CD prior to their marriage, and that he collected an inheritance from his grandmother during the marriage. However, she indicated that the parties had conversations about those amounts and stated that, "We were going to put it into a joint checking account and then put the money into the money market account." Ms. Lambert stated that they put money into the wholesale account because the interest rate was much higher than that of their checking account.

Ms. Lambert testified that the medical needs of the children are even greater than what was represented in Mr. Lambert's testimony. Ms. Lambert acknowledged that before their separation Mr. Lambert helped some with caring for the children and administering Braden's lung treatments. However, she testified that she has been the children's primary caretaker as far as their medical concerns, and that she stayed at the hospital during their

hospitalizations. Ms. Lambert has been employed by Arkansas Tech since 2000, and stated that her employer is very supportive and has created a position that allows her to take off for extended periods when her children require hospitalization. In her testimony, Ms. Lambert asked for one-half of any reimbursements from the AFLAC policy, but did not indicate that she should share in payment of the premiums.

Ms. Lambert's first argument on appeal is that all of the wholesale GMAC account was marital property, and thus that the trial court erred in failing to divide it equally. In particular, Ms. Lambert assigns error to the non-marital character placed on the \$15,804.45 generated from Mr. Lambert's pre-marital CD, and the \$8172.15 inheritance he received from his grandmother. She correctly notes that each of these checks was deposited by Mr. Lambert into the parties' joint checking account.

Ms. Lambert cites *Reed v. Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988), where we held that once property is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a strong presumption that the property is owned by the parties as tenants by the entirety. That presumption may only be overcome by clear and convincing evidence that the spouse did not intend to make a gift of one-half interest to the other spouse. *Id.* In the present case, Ms. Lambert contends that Mr. Lambert failed to rebut the presumption by clear and convincing evidence. She asserts that there was no evidence of any agreement that these deposits would remain the separate property of Mr. Lambert, and directs us to her testimony where she indicated that the funds were treated as marital property. Ms. Lambert notes that all of the interest earned on the wholesale

GMAC account was reflected as “joint” on the parties’ 2005 and 2006 Arkansas income tax returns. Ms. Lambert further asserts that all of the funds deposited into the wholesale account were commingled with Mr. Lambert’s father’s deposits as well as interest deposits by GMAC. Finally, Ms. Lambert argues that because the \$8500 check to Lambert Motors was written one day before the \$8172.15 inheritance check was deposited into the joint account, the \$8500 check cannot be traced to the inheritance proceeds. For these reasons, Ms. Lambert asks that we reverse and remand for an even division of the \$23,976.60 at issue.

We hold that the trial court’s determination that the two deposits remained the non-marital property of Mr. Lambert was not clearly erroneous. We are guided by *Jackson v. Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989), where our supreme court held that where the appellee deposited her non-marital funds in the parties’ checking account and then wrote a check on the funds, she merely poured her non-marital fund in and out of the joint account and this action did not render them funds owned by the entirety. In the case at bar, Mr. Lambert indicated that the non-marital checks could not be deposited directly into the wholesale GMAC account because they were not rounded to even numbers. Therefore, according to his testimony, he deposited each check into the joint checking account and almost immediately turned around and deposited a similar but rounded amount into the wholesale account. With regard to the premarital CD, both transactions were executed on the same day. And while Mr. Lambert dated the \$8500 check to Lambert Motors that corresponded to his inheritance check on the day before his inheritance was deposited into the joint checking account, the bank records reflect that the check to Lambert Motors was

not deposited until the following day. These transactions were directly traceable to Mr. Lambert's non-marital property. While the fact that the interest from the wholesale account was reported as "joint" on the parties' Arkansas tax returns is a factor to consider, it is not dispositive in determining the character of the deposits at issue. And while Ms. Lambert asserts that there was a commingling of funds, there was no evidence that she could exercise any control over the monies in the wholesale account during the marriage, and the funds deposited into that account by Mr. Lambert were easily identifiable and could be withdrawn along with interest when the funds were available. Given the evidence presented, we find no error in the trial court's finding that Mr. Lambert successfully rebutted the presumption and thus was entitled to \$23,976.60 of the wholesale account as his separate property.

Ms. Lambert's remaining argument is that the AFLAC insurance policy was marital property, and therefore should have been divided equally between the parties. She details in her brief the extraordinary health problems of the children, and asserts that the children are reasonably certain to continue to require hospitalizations and surgeries. Should this occur, AFLAC would not pay medical bills but would instead pay Mr. Lambert directly. Ms. Lambert notes that she is the primary custodian, and that she changed her job at Arkansas Tech so she can take unpaid leave when necessary to attend to the medical needs of the children. She further maintains that due to the children's extensive health problems, she is unable to get an additional supplemental insurance for the children. Because the AFLAC policy was contracted by Mr. Lambert during the marriage, Ms. Lambert asserts that it is marital property pursuant to Ark. Code Ann. § 9-12-315(b) (Repl. 2008). Ms. Lambert now

states that she is more than willing to pay one-half of the AFLAC premium, and that she fully expected the trial court to make an equitable order in that regard. She asks us to reverse and remand with instructions to divide the interest in the AFLAC policy equally, both with regard to the premiums and benefits receivable under the policy.

We hold that there was no clear error by the trial court in allowing Mr. Lambert to keep the AFLAC policy as his personal property. In her testimony, Ms. Lambert indicated that she did not want to be responsible for half of the premium. In deciding the issue from the bench, the trial court stated, “The AFLAC is something over and above, so I don’t see unless she is paying half the premium that she is entitled to any portion of those.” For the first time on appeal, Ms. Lambert now requests that she be responsible for one-half of the AFLAC premium in exchange for one-half of the benefits, but it is axiomatic that a party may not raise an argument for the first time on appeal. *See Seymour v. Biehlich*, 371 Ark. 359, 266 S.W.3d 722 (2007). Because this alternative argument was not presented to the trial court, we affirm the trial court’s decision on this issue.

Affirmed.

PITTMAN and GRUBER, JJ., agree.